SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

J. R. McLEOD,

Petitioner,

vs.

THE CITY OF JACKSON, MISSISSIPPI, A MUNICIPAL CORPORATION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Mississippi is reported in 24 Southern (2d) 319, Advance Sheets.

JURISDICTION

The statement concerning jurisdiction is set forth in the petition and is incorporated herein by reference.

STATEMENT OF THE CASE

The statement of the case appears in the petition and is incorporated herein by reference. There is no dispute con-

cerning the facts involved, and such facts as are relevant are set forth in such statement and in the arguments that follow.

SPECIFICATION OF ERRORS

The Supreme Court of Mississippi erred in the following respects:

(1) Refusing to hold that the action of the City of Jackson, Mississippi (regardless of whether such action was accomplished through the Mayor, the City Commissioners, the Civil Service Commission or by City Ordinance) in dismissing petitioner from his employment as a policeman for the sole reason that petitioner had signified an intention to become a member of a particular labor organization whose laws and procedures were specially adapted to serve the interests of policemen, operated to prohibit petitioner from exercising his rights of assembly, speech and petition contrary to the guarantees of the First Amendment and to the protections afforded petitioner in the exercise of such rights under the Fourteenth Amendment.

(2) In refusing to hold that said action of the City of Jackson, causing petitioner to lose not only his employment but vested seniority and pension rights, was so arbitrary and discriminatory as to deprive petitioner of property without due process of law and to deny him equal protection of the law contrary to the provisions of the Fourteenth Amendment.

ARGUMENT

I

The Action of the City of Jackson in Requiring Petitioner to Surrender His Right to Join the Particular Labor Organization Involved in This Case as a Condition of His Employment With the City as a Policeman, and in Dismissing Petitioner from Such Employment for the Sole Reason That He Expressed an Intention to Join With His Fellow Employees in Such an Organization, Is in Contravention of the First and Fourteenth Amendments to the United States Constitution as Depriving Petitioner of His Civil Rights of Assembly, Speech and Petition.

Petitioner, employed for many years by the City of Jackson, Mississippi, as a policeman and possessing a completely satisfactory service record, was discharged for the sole reason that he, together with thirty-three of his fellow policemen, had signified an intention of forming and joining a labor organization to be affiliated with the American Federation of State, County and Municipal Employees. The City took no account of the fact that that organization forbade striking by such of its members as were police officers and, indeed, in respect to such class of members did not even seek the customary collective bargaining agreements but instead relied upon the presentation of economic data and argument and appeal to the public to achieve protection and betterment of working conditions of its member policemen. Petitioner was not discharged for having engaged or having threatened to engage in any particular course of conduct while a member of such organization deemed by the City to be detrimental to its interests. Petitioner's discharge thus raises the important question of

whether any municipality can, consistent with the basic democratic rights secured under the First Amendment, require the surrender of the bare right to join a labor organization as a condition of employment as a policeman.

Before this question can be resolved, it is necessary to determine whether petitioner, in seeking to exercise the right of joining with his fellow police officers in a labor organization, was seeking to exercise a right secured under the First Amendment.

A. Right of Employees to Associate and Assemble Together in a Labor Organization for Purposes of Common Conference and Mutual Assistance Is a Concomitant of The Civil Rights of Assembly, Speech and Petition Sanctioned Under The First Amendment.

The right of people peacefully to assemble for political, social, economic or religious objectives and to petition for redress of grievances existed long before the adoption of the Constitution, is one of the inherent attributes of citizenship under a free government and is found wherever free government exists. *United States* v. *Cruikshank,* 92 U. S. 542, at 552; *State* v. *Butterworth,* 104 N. J. L. 549, 142 A. 57, 58 A. L. R. 744.

It was long ago determined by this Court that assemblage by any class of persons into political organizations for purposes of taking political action was a right protected as a concomitant of the right of assemblage. *Whitney* v. *California,* 274 U. S. 357. In *Herndon* v. *Lowry, supra,* the Court upheld the constitutional right to "address meetings and organize parties." *DeJonge* v. *Oregon, supra,* like the *Herndon* case, turned on the right under the First Amendment of individuals to form and organize groups and to solicit membership and to engage in the general dis-

semination of information through the medium of those organized groups.

That the right of assembly and petition does not exist only in regard to religious or political activities but extends to assembly for economic, scientific or informational ends as well was quite recently affirmed by this Court. In *Thomas* v. *Collins, supra,* this Court held specifically that the right of employees to assemble, speak and petition for economic ends in and through labor organizations is one protected by the First Amendment:

> "The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.
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> "The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so."
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> "Lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers. *And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.*" (Emphasis supplied.)

In *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 251, it was said by the Court in reference to Section 7 of the National Labor Relations Act:

> "Neither this provision, nor any other provision of the Act can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 33-34, we observed this right to be a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has to organize its business and select its own officers and agents; * * *"

See also *Hague* v. *C. I. O., supra; Thornhill* v. *Alabama, supra.*

The foregoing cases make clear that an employee, as an attribute of citizenship in this country, has at least the bare right to associate together with his fellow employees into a labor organization for purposes of common consultation and mutual aid and assistance. Is the fact that petitioner is employed as a policeman sufficient to require him to surrender that right under the circumstances of this case as a condition of his continued employment?

B. The State Can Restrict or Restrain The Exercise of Civil Rights, as Distinguished from Dealing with Abuses Arising Therefrom Only When Such Exercise Involves Grave and Immediate Danger to Public Interests—Circumstances Not Present in The Instant Case.

In the *Thomas* case, *supra,* this Court stated that "the indispensable, democratic freedoms secured by the First Amendment" occupy "a preferred place" in our scheme of government which "gives these liberties a sanctity and

a sanction not permitting dubious intrusions." This Court in that case further stated that:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice These nights rest on firmed foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

See also *West Virginia* v. *Barnett, supra.*

What are the circumstances of grave and impending public danger in the present case which might serve to justify the action of the city in dismissing petitioner because of his expressed intention to join a labor organization and to require as a condition of petitioner's employment that he refrain from assembling with his fellow employees into a labor organization? It must be remembered that "fear of serious injury cannot alone justify suppression of free speech and assembly * * * Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is relatively serious * * * Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was so substantial as to justify the stringent restriction inter-

posed by the legislature." Mr. Justice Brandeis, in *Whitney* v. *California, supra,* at 377.

The City of Jackson was not confronted with a strike or threat of strike by petitioner or any other policeman by reason of the membership or contemplated membership of such policeman in the American Federation of State, County & Municipal Employees. Indeed, had the city officials taken the trouble to investigate the organization in question they would have found, as the record herein discloses and as has been previously indicated, that such organization forbade the right to strike, does not engage in collective bargaining in the usual sense, and otherwise accommodated its proceedings to the enlistment of policemen into membership; the fact is that the policemen in question were willing voluntarily to relinquish their right to strike (R. —). Neither was the City confronted with any particular situation under which mere membership in a labor organization by city policemen created a condition of grave public danger. Petitioner was flatly prohibited from peacefully exercising his bare right of assembly merely because the City feared that sometime in the future under some undetermined circumstance the fact of membership might in itself create a condition of grave public peril. Even this fear of future danger was entirely speculative and completely without foundation in any facts within the knowledge of the City tending to indicate that, by reason of the nature of the organization or its practices as expressed in its laws, its literature or in its past history, membership therein would jeopardize public safety.

It is possible, of course, that abuses might arise from the fact that a policeman became a member of a labor organization. A strike of police officers might endanger public interests, but the City's interdiction was not directed against striking or even threats of striking. Acts of favoritism or preference by reason of such affiliation might also bring

about situations inconsistent with public safety. By the same token, however, membership in any organization—fraternal or religious—might bring about similar situations. But, again, the proscription did not run against acts of favoritism; the bare assemblage of policemen in a labor organization was prohibited. It is one thing to regulate and proscribe against abuses which might follow from peaceable assembly, from common consultation and discussion, or from an attempt to petition for redress of grievances. It is quite another to restrain, regulate or prohibit the exercise of these basic rights themselves. The distinction has most aptly been stated in the case of *DeJonge* v. *Oregon, supra.* In speaking of the rights secured under the First Amendment, this Court stated:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.
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> "It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. *The question, if the rights of free speech*

> *and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose;* not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crime elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. *But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge."* (Emphasis supplied.)

By the same token and for exactly the same reasons it is respectfully submitted that the City of Jackson cannot seize upon mere participation by its policemen in a peaceable and lawful assembly as a basis for the imposition of drastic penalties in the complete absence of any particular abuses, either actual or threatened, arising from or incident to such assemblage. If the City feels that certain action might be engaged in by its policemen as a result of their affiliation, there is nothing to prevent the City from stating in advance that if and when any such actions are engaged in or threatened to be engaged in, then the policemen will be subject to suspension, discharge, or other penalty; the mere fact of joining an organization such as the American Federation of State, County and Municipal Employees cannot in and of itself be unconditionally proscribed.

C. The State or a Branch Thereof Does Not Possess Absolute Power to Condition Employment With It; Such Power Is Limited at Least by the Provisions of the First Amendment.

A principal argument advanced by the City of Jackson in support of its action in prohibiting its police employees

from assembling into a labor organization is that the City possesses an unlimited power to prescribe conditions in respect to the employment of its own employees. Although there are decisions sustaining the proposition that the State in its capacity as an employer has almost the same discretion to impose conditions as does a private employer (*Heim* v. *McCall*, 239 U. S. 175), no case supports the proposition that this power is unlimited and can be exercised without regard even to the Bill of Rights. Thus, the *Heim* case merely held that a State policy of employing only its own citizens to the exclusion of aliens is a reasonable one based upon reasonable distinctions. Neither that case nor any other case involving government employment holds that either the State or Federal government can provide that no government employee shall adhere to a particular religion, shall belong to a particular political party, or shall be a member of a particular race. Nor do decisions indicating that there is no property right in a public office support a conclusion that a government may condition public employment as it pleases. Mr. Justice Cardozo, while sitting as Chief Judge of the New York Court of Appeals and Errors, pointed out the distinction in the case of *People* v. *Crane*, 214 N. Y. 154, affirmed 239 U. S. 195. In upholding the right of the State of New York to prohibit the employment of aliens in the construction of public works, Justice Cardozo stated as follows:

> "In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the State. (*Smith* v. *Texas*, 233 U. S. 630, 638.) We do not hold it may discriminate among its citizens on the ground of faith or color. (*Strauder* v. *West Virginia*, 100 U. S. 303; *Gibson* v. *Mississippi*, 162 U. S. 565;

Rogers v. *Alabama*, 192 U. S. 226, 231.) A citizen may not be disqualified because of faith or color from service as a juror. (*Strauder* v. *West Virginia, supra.*) For like reasons we assume that he may not be disqualified because of faith or color from serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared disqualified from service, unless the proscription bears some relation to the advancement of the public welfare. (*Strauder* v. *West Virginia, supra*, at p. 305.)"

Mr. Justice Bradley, in his dissenting opinion in the case of *Ex parte Curtis*, 106 U. S. 371, 376, further emphasized this point in a statement unquestioned by the majority opinion:

"The offices of the government do not belong to the Legislative Department to dispose of on any conditions it may choose to impose. The legislature creates most of the offices, it is true, and provides compensation for the discharge of their duties; but that is its duty to do, in order to establish a complete organization of the functions of government. When established, the offices are, or ought to be, open to all. They belong to the United States, and not to Congress; and every citizen having the proper qualifications has the right to accept office, and to be a candidate therefor. This is a fundamental right of which the legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights."

In *Wilson* v. *North Carolina*, 169 U. S. 586, at 593, it was contended that a state statute, and action of the Governor under it in suspending a railroad commissioner from office, deprived that officer of rights guaranteed by the Fourteenth Amendment. The highest state court had held that the stat-

ute was valid and the governor's action was proper. This court held that under these circumstances no Federal question was presented. The Court stated:

> "The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held * * * The fact would have to be most rare and exceptional which would give rise in a case of this nature to a federal question."

But this Court went on to quote with approval its language in *Allen* v. *Georgia,* 166 U. S. 138, at 140, that:

> "The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

And in *Hague* v. *C.I.O., supra,* this Court held that a municipality does not possess an absolute discretion to deny use of its streets for purposes of speech or assembly.

Petitioner does not, of course, contend for the right to exercise his liberties of assembly, speech and petition during working hours or in a manner such as to conflict with his official duties. He does contend that he cannot be required by the City of Jackson to surrender or bargain away his fundamental right to associate and assemble together with his fellow employees during his free hours for purposes of common consultation and mutual aid, and for purposes of petitioning for redress of his grievances, through an organization of his own choosing. These, it is respectfully submitted, are fundamental rights which no branch of government can cause to be surrendered even as a condition of employment by government. As stated by this Court in *Thomas* v. *Collins, supra:*

> "There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic

may exercise throughout its length and breadth, which no State, nor all together, nor the National itself, can prohibit, restrain or impede."

II

The Action of the City of Jackson in Requiring Petitioner to Surrender His Rights of Assembly, Speech and Petition by and Through a Labor Organization of His Choosing as a Condition of Employment, Thereby Depriving Petitioner Not Only of His Employment But of His Vested Seniority and Pension Rights, Is so Arbitrary and Discriminatory as to Deprive Petitioner of Property Without Due Process of Law and Deny Him Equal Protection of the Law.

The action of the City of Jackson, in requiring petitioner to lose his employment as a police officer because of his professed intention to join the American Federation of State, County & Municipal Employes, resulted not only in loss of employment but in loss of seniority rights secured under state statutes and in loss of participation in a benefit fund to which petitioner had regularly contributed for a number of years. Even if it be said that petitioner had no property right in his job as such, he surely had property right both in his seniority privileges (*Evans* v. *Louisville & N. R. R.*, 191 Ga. 395, 12 S. E. (2d) 611 (1940); *Bradford* v. *Kurn & Lonsdale*, 235 Mo. App. 1282, 146 S. W. (2d) 644 (1940); *Ledford* v. *Chicago, M., St. P. & Pac. R. R.*, 298 Ill. App. 298; *Griffin* v. *Chicago Union Station*, 13 Fed. Sup. 722; *Nord* v. *Griffin*, 86 Fed. (2d) 481; *Estes* v. *Union Terminal Co.*, 89 Fed. (2d) 768) and in the benefit fund to which he had contributed.

Such rights, vested as they are, cannot under the Fourteenth Amendment be taken from petitioner by the State

or a branch thereof without due process of law or in a manner so as to deny him equal protection of the law.

Since the case of *Nebbia* v. *New York, supra,* it has been established that the State can deprive of property rights where there exists a rational basis for such deprivation, but that rational basis requires a reasonable connection between the prohibition imposed and the objective sought. In the present case the sole reason for the action of the City of Jackson in depriving petitioner of his vested property rights was that petitioner had professed a desire to affiliate with a particular labor organization, an organization which in fact prohibits its policemen members from striking and which, instead of seeking to protect and better the conditions of employment of its members through the usual process of collective bargaining, seeks to accomplish such objective by means of presentation of economic data and argument and by direct appeal to the general public through the media of press, radio, handbill and speech. There was nothing in the mere fact of joining such organization, even if petitioner had actually joined, which would *per se* incapacitate petitioner in the performance of his police duties, and no activity was threatened which would interfere with such duties. There was no request or demand that the petitioner engage in any activities during his working hours or that he be permitted to perform any acts which would interfere with his duties as policeman. The bare fact of peaceful assemblage with his fellow employees was seized upon as a reason of depriving petitioner not only of his employment but of his seniority rights and his interest in the benefit fund. Surely, such action is arbitrary and unreasonable and without rational basis within the meaning of those terms as used in *Nebbia* v. *New York, supra,* and cases subsequently decided, and as such contravenes the due process clause of the Fourteenth Amendment.

In addition, the denial of the right of citizens of the State of Mississippi, who were or intended to become members of a labor organization such as the American Federation of State, County & Municipal Employees, to obtain or retain employment by the State as police officers, was highly discriminatory, and when such discriminatory action resulted in the deprivation of property rights as it has in the present case, it constitutes a denial of the equal protection of the laws contrary to the Fourteenth Amendment. Of all the citizens of Mississippi, only those who are members of the American Federation of State, County & Municipal Employees are denied opportunity to serve the State as policemen. The prohibition has no necessary connection with the capabilities of the members of the excluded class or of their ability adequately and faithfully to perform the duties of their office. The distinction between the class of citizens who desires to join labor organizations and the class who does not is an arbitrary one in so far as employment with the State is concerned. In being deprived of his employment, seniority and benefit rights for the sole reason that he did seek to become a member of an organization such as the American Federation of State, County & Municipal Employees, petitioner was clearly denied the equal protection of the laws under the principles of law set forth in cases such as *Smith* v. *Texas,* 233 U. S. 630; *Borden's Farm Products* v. *Baldwin, supra; Frost* v. *Corporation Commission, supra.*

CONCLUSION

It is respectfully submitted that under the decisions cited and discussed in the foregoing arguments petitioner has been denied and deprived of rights granted and secured under the Constitution of the United States, and that the

decision of the Mississippi Supreme Court refusing so to declare should be reversed; to that end this Court is respectfully requested to grant this writ of certiorari.

Respectfully submitted,

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